Nos. 96-552 and 96-553

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

RACHEL AGOSTINI, *et al.*,
Petitioners,

v.

BETTY-LOUISE FELTON, *et al.*,
Respondents.

CHANCELLOR OF THE BOARD OF EDUCATION
OF THE CITY OF NEW YORK, *et al.*,
Petitioners,

v.

BETTY-LOUISE FELTON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONERS RACHEL AGOSTINI, ET AL.

KEVIN T. BAINE*
EMMET T. FLOOD
WILLIAMS & CONNOLLY
725 12th St. N.W.
Washington, D.C. 20005
(202)-434-5000
Attorneys for Petitioners Rachel Agostini, et al.

**Counsel of Record*

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Respondents urge the Court to avoid confronting the continuing vitality of *Aguilar v. Felton*, 473 U.S. 402 (1985), or, if it confronts that issue, to adopt one of several proposed alternative rationales for the result in *Aguilar*. The one argument that respondents do *not* make in their brief is that *Aguilar's* entanglement analysis should be reaffirmed. That omission is significant. It underscores petitioners' point that the law has changed since *Aguilar* was decided, and that

the continuing injunction in this case should be reassessed under prevailing Establishment Clause principles.

ARGUMENT

I. THE ISSUE OF *AGUILAR'S* CONTINUING VITALITY IS PROPERLY BEFORE THE COURT

Respondents recognize, as they must, that the federal courts have inherent power to modify or vacate continuing injunctions. They recognize, too, that under *Standard Oil Co. v. United States*, 429 U.S. 17 (1976), an application for relief from a judgment that was mandated or affirmed by this Court is properly directed to the district court under Rule 60(b). There is no question, therefore, that a motion under Rule 60(b) was the proper procedural vehicle for petitioners to seek the relief that they seek.

The only question is whether petitioners have stated adequate grounds for relief under Rule 60(b). Respondents suggest that there cannot be adequate grounds unless and until the decision in *Aguilar* has been overruled in another case—or, to put it another way, that this Court cannot overrule its prior decision on a Rule 60(b) motion in the same case. "The question presented here," they state, is this: "May the Supreme Court on appellate review of a properly decided 60(b) motion use the motion as a vehicle to overturn controlling precedent?" Br. Resp. 21.

The answer to respondents' question is surely "yes." This Court can use any case over which it has jurisdiction as a vehicle to overrule one of its own precedents. And there is no question that the Court has jurisdiction over this case. The district court had jurisdiction to entertain the Rule 60(b) motions for relief from the judgment, the court of appeals had jurisdiction under 28 U.S.C. § 1291, and this Court has jurisdiction under 28 U.S.C. § 1254(1).

That the decision requiring entry of the injunction in this case has not been overruled already is no barrier to the granting of relief under Rule 60(b). That is typically the case with a Rule 60(b) motion: the decision that is the subject of the Rule 60(b) motion has not been overruled or set aside before the motion is made. The question on the motion is whether the prior decision should be set aside, not whether it already has been.

The grounds for setting aside a prior judgment—in particular, a continuing injunction—are broadly stated in Rule 60(b): that "it is no longer equitable that the judgment should have prospective application," or "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(5), (6). If this Court is of the view that the Establishment Clause was misinterpreted in *Aguilar*—that there is no constitutional impediment to an on-premises Title I program—then that is as powerful a reason as there could be to grant relief from the continuing injunction that prohibits such a program. Likewise, if the Court is persuaded that *Aguilar* has "foreclos[ed] a practical response to the logistical difficulties of extending needed and desired aid to all the children of the community," *Wolman v. Walter*, 433 U.S. 229, 247 n.14 (1977), that is another powerful reason for granting relief from the judgment.

There is no reason to fear, as respondents suggest, that granting relief in this case will encourage litigants to misuse Rule 60(b) as a device for a second appeal or as a substitute for a timely petition for rehearing. Nor is there reason to fear that the courts will be burdened by Rule 60(b) motions whenever there is a change in the composition of the Court. Those suggestions trivialize the extraordinary circumstances that warranted petitioners' request in this case.

First, as a practical matter, the continuing injunction was having a devastating effect on Title I programs in New York

City and throughout the country. In New York City alone, over one hundred million dollars had been wasted on the additional costs of compliance with *Aguilar*, and services were being denied to thousands of needy children every year.

Second, as a legal matter, there had been significant changes in the governing Establishment Clause principles. As explained in our initial brief, the "excessive entanglement" prong upon which *Aguilar* was based appeared to have been abandoned, and the principle of neutrality had been applied in a way that appeared to foreclose any other rationale for the result in *Aguilar*. *See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 115 S. Ct. 2510 (1995); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Bowen v. Kendrick*, 487 U.S. 589, 615-16 (1988); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986). Thus, petitioners did not rely simply upon a change in the Court's membership, nor were they simply rearguing the case they had lost. They were able to demonstrate, in the district court's words, that "[i]n the years since the Supreme Court's *Aguilar* decision, the landscape of Establishment Clause decisions ha[d] changed." Pet. App. 4a.

Third, in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), a majority of the Members of this Court had explicitly criticized or questioned *Aguilar* and at least implicitly invited a request for its reconsideration. Contrary to respondents' contention, petitioners do not maintain that these individual expressions of opinion themselves constituted a change in law. The change in law was effected in other decisions of the entire Court in such cases as *Witters*, *Bowen*, *Zobrest*, and *Rosenberger*. But the individual expressions of five Justices in *Kiryas Joel*, which called for the overruling or

reconsideration of *Aguilar*, surely qualify as "other reason[s]" warranting a request for reconsideration. Fed. R. Civ. P. 60(b)(6).

Taken together, these three considerations established a uniquely powerful case for a Rule 60(b) application. The district court and the court of appeals recognized the strength of the case, but felt that only this Court could ultimately say whether the case was strong enough. It then remained for this Court to decide whether to review the denial of the 60(b) motions and, having granted the petitions for writs of certiorari, to decide whether the argument for overruling *Aguilar* is ultimately persuasive.[1] But the issue has been properly presented to the Court, and there is no reason for

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[1] The denial of a Rule 60(b) motion is subject to review under an abuse-of-discretion standard. *See, e.g., Brien v. Kullman Indus.*, 71 F.3d 1073, 1077 (2d Cir. 1995). That standard, however, requires reversal if the district court applied the wrong legal principles. *See, e.g., Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of law."); *Koon v. United States*, 116 S. Ct. 2035, 2047-48 (1996) ("[A]n abuse of discretion standard does not mean a mistake of law is beyond appellate correction. . . . The abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions."). In this case, the district court was "guided by [the] erroneous legal conclusion[]" stated in *Aguilar*. *Id.* It is appropriate under the abuse-of-discretion standard for this Court to clarify the legal principles that should be applied and, if necessary, to remand the case for the district court to exercise its discretion under the correct legal principles. Alternatively, if, as petitioners contend, the correct legal principles leave no room for the exercise of discretion, the Court can reverse and remand with instructions to vacate the injunction.

the Court to leave the issue in the state of uncertainty in which it now rests.[2]

Respondents raise various institutional arguments as to why the Court should not consider overruling *Aguilar*. But those institutional arguments are unpersuasive in the unique circumstances of this case. The interests in finality and *stare decisis* counsel generally against granting a Rule 60(b) motion or overruling a precedent. But "[t]he principle of finality is not offended by modification which disturbs no accrued rights and concerns only future conduct." *Polites v. United States*, 364 U.S. 426, 440 (1960) (Brennan, J., dissenting). And the principles of finality and *stare decisis* are of reduced significance when, as in this case, a precedent has already been undermined by subsequent decisions and explicitly questioned by a majority of the Members of the Court.

Under these circumstances, the interest in "institutional integrity," which the respondents also invoke, warrants confronting the prior precedent head-on and clarifying whether it is in fact consistent with subsequent doctrinal developments. It advances no institutional interest for the

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[2] If an injunction is entered by the district court and never appealed, there would be no doubt that the district court could later grant relief from the judgment based on a showing that the governing legal principles had changed. *See* Rule 60(b)(5) (authorizing relief when it is "no longer equitable that the judgment should have prospective application"). There is no reason why the rule should be any different when the injunction was affirmed by, or entered at the direction of, an appellate court. It may ultimately be for the appellate court to decide whether the law had changed sufficiently to warrant overruling its prior decision, but that is no reason to conclude that the party whose case was decided at the appellate level should be barred from making the argument. And under *Standard Oil*, it is clear that the argument is properly directed in the first instance to the district court.

Court to issue decisions that undermine *Aguilar*, for a majority of the Justices to invite reconsideration of the decision, and for the Court then to turn a deaf ear to the affected parties who seek the reconsideration that has been invited.[3]

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[3] There is some suggestion in the Brief *Amici Curiae* of Council on Religious Liberty, et al. that *Helms v. Cody*, 856 F. Supp. 1102 (E.D. La. 1994), *appeal docketed sub nom. Helms v. Picard*, No. 97-30231 (5th Cir., Mar. 17, 1997), would be a better vehicle for reconsideration of *Aguilar* by this Court. The issue at this point, however, is not which case would be a better vehicle for reconsideration of *Aguilar*, but whether this case is a proper vehicle.

It bears noting, moreover, that the *amicus* brief touting the *Helms* case was filed on behalf of the plaintiffs in *Helms*, among others, and was authored by their counsel in the case—the same counsel who elected not to seek review in this Court in three other cases that would have presented an opportunity for this Court to revisit *Aguilar*. *See Walker v. San Francisco Unified Sch. Dist.*, 46 F.3d 1449 (9th Cir. 1995); *Barnes v. Cavazos*, 966 F.2d 1056 (6th Cir. 1992); *Pulido v. Cavazos*, 934 F.2d 912 (8th Cir. 1991). There is no reason to assume that the same counsel would seek to bring the *Helms* case to this Court.

Nor can the Court assume that it will ever have an opportunity to review *Committee for Public Education and Religious Liberty ["PEARL"] v. Secretary*, 942 F. Supp. 842 (E.D.N.Y. 1996), in which the court upheld post-*Aguilar* arrangements in New York City's Title I program. Respondents' counsel, who also represents the plaintiffs in *PEARL*, dismissed his appeal in *PEARL* without prejudice to its reinstatement within 30 days of the final determination of this Court in the present case. But even if the appeal were to be reinstated, respondents' counsel has already confirmed his hesitancy to bring any such case before this Court:

> [Petitioners] argue, and perhaps they are correct, that the parties in all of the aforementioned cases, including the *PEARL* case, who wish *Aguilar* to continue to be the law of the land have not and will not seek to bring a case before the Supreme Court at the present time and with the present membership in which the Court might explicitly overrule *Aguilar*. That, of course, is their right. They neither break nor bend any rule in not seeking certiorari.

In sum, the motions under Rule 60(b) were procedurally proper, and the Court should decide the issue that they present: does *Aguilar* any longer reflect the current understanding of the First Amendment's prohibition against an establishment of religion?

II. *AGUILAR* SHOULD BE OVERRULED

Respondents make no effort to defend the result in *Aguilar* on the ground upon which it was based—that providing Title I services on the premises of parochial schools gives rise to excessive entanglement of government and religion. In fact, respondents explicitly "eschew defending . . . the 'entanglement' prong" of *Lemon* and maintain that "reference to that doctrine is unnecessary" to decide this case. Br. Resp. 31, 43. *Aguilar's* rejection of on-premises Title services was correct, respondents contend, "as a prophylactic measure" to ensure that Title I teachers do not promote religion, or, alternatively, because on-premises Title I programs create a "symbolic union" between church and state and impermissibly subsidize the religious functions of the private schools. These arguments, however, do not support the result in *Aguilar* any more than does the notion of excessive entanglement upon which the Court relied.

A. Excessive Entanglement

Although respondents do not address the issue of excessive entanglement, several *amici* do. Significantly, however, a number of *amici* who identify themselves as supporting respondents in fact agree with petitioners that on-premises Title I programs need not involve excessive

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Reply Brief for Plaintiffs-Appellees-Cross-Appellants, Betty-Louise Felton, et al. in *Felton v. Secretary*, No. 96-6160 (2d Cir. 1996), at 10-11.

entanglement.[4] In their view, any Establishment Clause concerns are eliminated as long as (a) Title I personnel are selected, assigned, supervised and disciplined by public authorities on the same terms as other public school teachers and without regard to race, religion, sex or political affiliation; (b) the curriculum is controlled by public school authorities; (c) access to services is dependent on objective tests selected by public school authorities and not on any religious criteria; and (d) classrooms are wholly under public school control and free of religious symbols.[5] With the exception of the unrealistic requirement that classrooms be "wholly" under public school control,[6] these conditions were met prior to *Aguilar* and would presumably be met in any

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[4] *See* Brief *Amici Curiae* of the American Jewish Congress, et al. 15-20. This is a significant change in the position of several *amici* (including the American Jewish Congress, the National Educational Association, the Baptist Joint Committee on Public Affairs, and the Central Conference of American Rabbis) who argued in *Aguilar*: "The Use of Public School Teachers to Provide Instruction in Secular Skills on the Premises of a Religious School Constitutes a *Per se* Entanglement of Church and State in Violation of the Establishment Clause." *See* Brief for the American Civil Liberties Union, et al. in *Aguilar v. Felton*, Nos. 84-237, 84-238 & 84-239, at 23. It is a change in position as well for the Anti-Defamation League, which filed a separate brief in *Aguilar*. *See* Brief *Amicus Curiae* for the Anti-Defamation League of B'Nai Brith in Support of Appellees, *Aguilar v. Felton*, at 10-14. It can fairly be said that the change in position of these *amici* reflects their recognition of a significant shift in the law.

[5] Brief *Amici Curiae* of the American Jewish Congress, et al. 19.

[6] Obviously the parochial school must retain control over maintenance of the Title I classroom. And although the parochial schools typically set aside a classroom for the exclusive use of Title I teachers before *Aguilar*, JA 58, there is no apparent reason why the Title I classroom could not be used for some other purpose when Title I services are not being offered.

on-premises program in the future. See JA 39-42, 46-63, 505-07.[7]

Other *amici* continue to argue, however, that on-premises Title I programs will necessarily involve excessive entanglement of government and religion. Their arguments are notably lacking in specificity, however, leaving at least two questions unanswered: First, how is it that public supervision of a public employee, or routine administrative contacts between Title I teachers and school officials, amount to "excessive entanglement" when the teaching takes place on the premises of the school, but not when the teaching takes place in a van parked out front? The supervision is the same, and the administrative contacts are the same. In neither case does the church-related school assert any interest in having the Title I teacher teach religion, in neither case is there any realistic danger that the Title I teacher will do so, and in neither case does the supervision to ensure that the Title I teacher does not do so intrude into matters of religious significance to the school. Likewise, in neither case do the routine administrative contacts interfere with the school's religious mission.[8]

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[7] Respondents speculate that Catholic Title I teachers have been assigned to Catholic school students and that Jewish Title I teachers have been assigned to Hebrew Day school students. Br. Resp. 4. The evidence is to the contrary. Assignments are made without regard to religion. JA 48-49, 340, 642-43. And although the Board maintains no record of the religious affiliations of Title I teachers, the affidavits of Title I teachers demonstrate that the vast majority of them work in nonpublic schools with religious affiliations different from their own. JA 49-50.

[8] It is unnecessary in this case to define with precision the schools' religious mission, or to characterize the degree to which the schools are "pervasively sectarian," as this Court has used the term. *See, e.g., Hunt v. McNair*, 413 U.S. 734 (1973), *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971). Respondents, however, have distorted the record and the

Second, what exactly are the *amici* concerned about when they speak of "excessive entanglement"? The only identifiable concern is that intrusive government involvement in religious affairs can inhibit religious freedom. That is a legitimate concern, but *amici* are confused in identifying it as an Establishment Clause concern. As noted in our main brief, "entanglement" of government and religion may reach the point that the government infringes the *free exercise* of religion, but "entanglement" is not a useful criterion for identifying when the government has *established* a religion.

The cases cited by *amici* confirm this understanding of the significance of "entanglement." *Amici*, for example, cite a series of cases holding that the courts may not involve themselves in matters of church discipline and governance. *See, e.g., Serbian East Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969). When the Court in those cases warned against becoming "entangled in essentially religious controversies," *Serbian East Orthodox Diocese*, 426 U.S. at 709, it was vindicating the church's right to free exercise of religion, not the general prohibition against an establishment of religion. *See also NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490

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contentions of the parties on these issues. Petitioners most assuredly do maintain that the Catholic schools in New York are *not* pervasively sectarian. The uncontroverted evidence is that (1) they do not restrict admissions or hiring on religious grounds and many (in some schools most) of their students are not Catholic; (2) they do not make an effort to compel their students to adopt or obey the teachings of Catholicism; and, most importantly, (3) they do not impose religious restrictions on the content of secular instruction. JA 660-61, 665, 685-86, 690. The record makes clear that the inner-city Catholic schools whose students receive Title I services do not exist "solely for narrow parochial or sectarian purposes"; their mission . . . is as much educational and social as it is religious." JA 672; *see also* JA 694-97.

(1979) (refusing to extend NLRB jurisdiction to church-operated schools because of potential for interference with church's First Amendment rights).

Amici also cite a series of cases in which the Court has upheld the application of a tax or other regulation to a religious organization. *See, e.g., Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378 (1990); *Hernandez v. Commissioner*, 490 U.S. 680 (1989); *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985). But again, the principal argument that was being advanced (and in these cases rejected) was an argument by the religious organization that enforcement of the tax or regulation burdened the free exercise of religion. To the extent that the religious organization also argued that there was entanglement amounting to an Establishment Clause violation, the Court's response in *Swaggart Ministries* was on the mark: the Establishment Clause's "core values are not even remotely called into question" by "neutral and nondiscriminatory" regulation. 493 U.S. at 394.[9]

These cases, in which religious organizations raised First Amendment objections to government interference in their affairs, underscore the critical point about so-called "entanglement" of government and religion: government intrusion into, or regulation of, church affairs can inhibit the church's religious freedom, but it does not "establish" religion in any sense of the word. Churches and religious organizations whose religious freedom has been inhibited by government regulation may claim that their free exercise

[9] In *Hernandez*, the Church of Scientology raised a separate Establishment Clause objection—that allowing a tax deduction for "contributions," but denying a deduction for the price charged for its training sessions, created an "unconstitutional denominational preference." 490 U.S. at 695. That argument obviously had nothing to do with entanglement.

rights have been infringed, but nonadherents (like the plaintiffs here) have no standing to assert such a claim. And the Establishment Clause claim that they seem to assert is a contradiction in terms: regulations that interfere with someone else's religion cannot at the same time impermissibly endorse or promote or advance that religion.[10]

Nothing will be lost if the Court clarifies once and for all that "excessive entanglement" is not an Establishment Clause test. All of the cases discussed above would be unaffected, as would the remaining cases cited by the *amici*. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), did not rest on the notion of excessive entanglement that is at issue here. The evil in *Larkin* was that "important, discretionary governmental powers [were] delegated to . . . [a] religious institution[]." *Id.* at 127. That, according to the Court, (a) created a risk that governmental powers "could be employed for explicitly religious goals," (b) "provide[d] a significant symbolic benefit to religion in the minds of some," and (c) "create[d] the danger of '[p]olitical fragmentation and divisiveness on religious lines.'" *Id.* at 125-27 (citation omitted). There may be a question whether each of these considerations, standing alone, would be regarded as a

[10] The relationship between government and religion, of course, may result in an Establishment Clause violation if religion is impermissibly subsidized or endorsed, or if participation in religious activity is coerced. Something more than "entangling" regulation is present when these results occur, however. And if none of these results is present, it is difficult to understand what Establishment Clause value is offended by the mere fact of administrative contact. *See* Brief for Petitioners Rachel Agostini, et al. 29-30.

sufficient basis for the result in *Larkin*,[11] but there is no reason to fear that repudiation of *Lemon's* entanglement prong would undermine the result in *Larkin*.[12]

Nor would repudiation of *Lemon's* entanglement prong necessarily alter the result in *Lemon* itself. In that case, the Court held that the states of Pennsylvania and Rhode Island could not pay or reimburse the salaries of parochial school teachers. That result is correct as long as the Establishment Clause is interpreted to prohibit direct aid to a religious institution—a proposition that these petitioners need not and do not question in this case. *See* Brief for Petitioners Rachel Agostini, et al. at 21-22.

In sum, clarification that excessive entanglement is not an Establishment Clause test, or even a useful device to identify potential Establishment Clause violations, will not alter the result in any case other than *Aguilar* and, perhaps, the portion of *Meek v. Pittenger*, 421 U.S. 349, 367-72 (1975), upon which *Aguilar* was explicitly based. It is precisely those results, of course, that petitioners maintain ought to be altered. The government does not interfere with religious liberty when it supervises its own remedial teachers, or when it engages in the routine administrative contacts that are necessary to coordinate a limited program of remedial instruction with parochial school officials. Parochial school officials have never complained that those administrative

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[11] Neither "symbolic union" nor political divisiveness has ever been regarded as an independent basis for finding an Establishment Clause violation. *See* page 15, *infra*; *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring).

[12] *Amici* also cite *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), but that case *rejected* an Establishment Clause challenge to Title VII's exemption of religious organizations. It did not *rely* upon any notion of entanglement to find an Establishment Clause violation.

features of Title I interfere with their religious mission, and respondents would have no standing to assert such a claim even if there were a basis for one.

B. Respondents' "Prophylactic" Argument

Respondents attempt to save *Aguilar* by recasting its rationale. The real determination in *Aguilar*, they suggest, is that there is "no sure way to prevent public employees on parochial school premises from supporting the religion or religious mission of those schools," and that a rule against on-premises services must, therefore, be adopted as a "prophylactic measure." Br. Resp. 42-43. *Aguilar* was not explained in those terms, however, and any such explanation would be untenable.

Prophylactic rules may be necessary when there is no other way to ensure protection of a constitutional right, and when the prophylactic rule itself does not impose a significant burden on the exercise of some other constitutional right. *Miranda* warnings can be justified as a prophylactic rule under this rationale, but a rule against on-premises Title I services cannot. It is simply unrealistic to suggest that the danger of public employees' injecting religion into secular Title I classes is so great that not even reasonable supervision is sufficient to guard against the danger. Surely some substantial experience of abuse is necessary before a harsh prophylactic rule is adopted to prevent abuse. And there has been no such experience under Title I. *See Aguilar*, 473 U.S. at 424, 428 (O'Connor, J., dissenting).

A prophylactic rule against on-premises Title I services is not only unnecessary; it is affirmatively damaging in human, economic and constitutional terms. Students are denied needed remedial services in the setting that is most convenient and effective. The government is forced to spend hundreds of millions of dollars to pay the additional costs of

educationally inferior arrangements. And parents are discouraged from selecting the religious schools they would prefer for their children—a selection that implicates their First Amendment right to free exercise of religion, as well as their constitutionally protected "liberty . . . to direct the upbringing and education of [their] children." *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925).

In this area and under these circumstances, a prophylactic rule has no place.

C. Symbolic Union

This Court has never invoked "symbolic union" as an independent ground for invalidating a government program or practice. Nor has it condemned any and all "symbolic union" of church and state. If it had, then the motto "In God We Trust" would have to be abolished from the nation's currency.

The question, the Court has stated, is "whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985). There is no such likelihood here. As demonstrated in our initial brief (at 24-26), there is simply no way any reasonable observer could perceive a program that provides on-premises Title I services to all eligible schoolchildren, regardless of their parents' individual religious choices, as endorsing or disapproving any of those religious choices.

D. Subsidization of Religious Functions

Respondents acknowledge, as they must, that Title I does not involve any "direct funding" of any religious enterprise. Br. Resp. 39. They appear to suggest that Title I provides

"direct grants" that subsidize parochial schools. *Id.* But Title I does not involve any "direct grants" to any school. Title I money flows from the federal government to the New York City Board of Education; no money goes to the schools.

What respondents apparently mean to suggest is that Title I might *indirectly* subsidize parochial schools by taking over programs previously offered by the parochial schools. They do not go so far as to assert such a claim, however, because there is no evidence to support one. Instead, respondents offer their "belie[f]" that Title I services have "supplanted" the schools' own remedial programs, and suggest that the record is inadequate to determine whether that is the case. But respondents cannot rely upon a mere "belief" at this stage of the proceedings, and it is too late for them to suggest that the record needs to be developed. Respondents had ample opportunity—twice—to develop the record on this point, and the record is clear.

The Superintendent of Education of the Roman Catholic Diocese of Brooklyn submitted an uncontroverted affidavit in 1979, in which he stated that the Catholic schools of the Diocese had not previously provided "any of the types of remedial educational services presently available under Title I," and that the schools would not be in a position "to provide the services on their own" if Title I services were no longer available. JA 665. Again in 1995, in support of the petitioners' Rule 60(b) motion, the Superintendent reiterated that the services provided under Title I "are supplemental to the general educational services provided by" the schools and "have not replaced any educational services that were previously offered by" the schools. JA 660. Officials of the Archdiocese of New York submitted similar affidavits in 1979 and again in 1995. JA 685-86, 690.

In short, the unambiguous and uncontroverted testimony of the knowledgeable school officials is that the Title I program in New York is in strict compliance with the statutory mandate that programs supplement, and not supplant, services available from other sources. 20 U.S.C. § 6322(b); 34 C.F.R. 200.12(a) (1966). Respondents had the opportunity to question this testimony, but chose not to do so.[13]

There is thus no evidence that Title I has relieved any school of the burden of providing any secular instruction that was previously offered, much less that Title I "in effect subsidize[s] the *religious functions* of the parochial schools by taking over a *substantial portion of their responsibility for teaching secular subjects*." *Grand Rapids*, 473 U.S. at 397, *quoted in Zobrest*, 509 U.S. at 12 (emphasis added). Title I services are limited in scope, and they are available only to those children who meet the strict requirements of educational and economic deprivation. Given the extremely limited nature and scope of Title I, it cannot be said that Title I takes over "a substantial portion of [the schools'] responsibility for teaching secular subjects." *Id*. For that reason, Title I services could be provided without offending

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[13] Respondents are silent as to why they chose not to contest this testimony in the original proceeding in the district court. They claim that they had no opportunity to argue the "merits" of the constitutional issues on the Rule 60(b) motions, Br. Resp. 42, but that is simply not so. Respondents' observation that they "would not have risen to the bait" in any event, given their position that the Rule 60(b) motions were procedurally infirm, is more telling. *Id*. The fact is that respondents vigorously contested other facts below and they were never denied the opportunity to argue and submit evidence that Title I services supplanted services that were otherwise available in the parochial schools. And, of course, if there were such evidence, there would be no need to invoke the Establishment Clause, which may or may not be violated as a result; such evidence would establish a clear violation of the statute.

the Establishment Clause even if they did replace remedial services previously offered by a particular school. The fact that they do not replace any such services eliminates any argument whatsoever that Title I indirectly subsidizes religious activity by taking over a substantial portion of the schools' secular instruction.

Respondents themselves implicitly recognize that Title I does not impermissibly subsidize religious activity. For if it did, the problem would not be cured by moving Title I off-premises: Title I services could not be offered to parochial children at all. But not even respondents contend that Title I services must be denied to these students altogether. These services are purely secular, limited in scope, and available only to those few who meet the statutory criteria of educational and economic deprivation. They do not replace any services offered by the parochial schools. They do not, therefore, subsidize religious activity even indirectly.

CONCLUSION

Aguilar should be overruled. The judgment of the court of appeals should be reversed, and the case remanded with instructions to vacate the injunction.

Respectfully submitted,

KEVIN T. BAINE
Counsel of Record
EMMET T. FLOOD

WILLIAMS & CONNOLLY
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000

Attorneys for Petitioners
Rachel Agostini, et al.